Filed 3/20/12 Kleinman v. Cal. State Personnel Bd. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SUSAN KLEINMAN, Plaintiff and Appellant, v. CALIFORNIA STATE PERSONNEL BOARD, Defendant and Respondent.	B226239 (Los Angeles County Super. Ct. No. BC414820)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth White, Judge. Affirmed.

Pine & Pine, Norman Pine, Beverly Tillett Pine, Janet R. Gusdorff; Jay S. Rothman & Associates and Marina K. Fraigun for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Alicia M. B. Fowler, Assistant Attorney General, and Jerald L. Mosley, Deputy Attorney General, for Defendant and Respondent.

Plaintiff and appellant Susan Kleinman (Kleinman) appeals a judgment following a grant of summary judgment in favor of her former employer, defendant and respondent California State Personnel Board (the Board).

The essential issue presented is whether there exists a triable issue of material fact on Kleinman's claims under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.)[1] for failure to accommodate her disability (§ 12940, subd. (m)), failure to engage in the interactive process (§ 12940, subd. (n)), and disability discrimination (§ 12940, subd. (a)).

Based on our review of the record, we conclude no triable issues exist and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 1994, Kleinman began working at the Board as an administrative law judge (ALJ). On August 16, 2007, she was assigned to the Board's Los Angeles office. While driving back from a hearing, she sustained a back injury in a rear-end collision. Her doctor reported her unable to work and she filed a workers' compensation claim and was awarded benefits as of August 17, 2007. Kleinman never returned to work. She has filed for disability retirement.

The gravamen of this action is Kleinman's claim that during two brief periods of time when she was released to work with restrictions, the Board failed to bring her back with reasonable accommodations for her disability.

Kleinman's alleged first window of availability was a five-week period of time from April 1, 2008 to May 8, 2008. Kleinman's doctor laid out the following restrictions on her: she could return to work with no prolonged driving and no sitting for more than two hours per eight-hour shift; after 20 minutes of sitting she must stand, stretch and walk for 10 minutes. However, Kleinman admitted in her deposition that her doctor

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[1] All further statutory references are to the Government Code, unless otherwise specified.

"never cleared [her] because [she] was never off of IDL [industrial disability leave]." In any event, on May 8, 2008, Kleinman's doctor reported she was unable to work.

Kleinman's second window of availability commenced on December 1, 2008 and lasted 80 days, until February 19, 2009. During that interval, she was released by her doctor to work with the following restrictions: no driving more than two hours from home on the day of a scheduled hearing; driving was limited to the hours of 8:00 a.m. to 5:00 p.m.; walking no more than two blocks at a time; a 15-minute break after 40 minutes of driving; and telecommuting each Friday.

On February 19, 2009, Kleinman's doctor took her off work status again. Kleinman was never again released to work, with or without restrictions.[2]

1. *Pleadings.*

The operative second amended complaint (erroneously captioned first amended complaint), alleged four causes of action, but only the first cause of action is in issue on appeal – i.e., the first cause of action for disability discrimination. In that cause of action, Kleinman pled the Board, through the actions of Armando Hidalgo (Hidalgo), Chief of Human Resources, and Paul Ramsey (Ramsey), Chief Administrative Law Judge, discriminated against her on the basis of her disability, failed to engage in the interactive process, and failed to provide her with reasonable accommodations.

2. *The Board's motion for summary judgment*.

In moving for summary judgment, the Board contended, inter alia: it engaged in a good faith, lengthy interactive process with Kleinman; its offer of a part-time position in Rancho Cucamonga (Rancho) was a reasonable accommodation which would enable her to commute and work within her restrictions; and no full time position and no location other than Rancho were possible within her work restrictions.

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[2] Kleinman's briefs focus on her claim the Board failed to accommodate her during the latter 80-day period when she was available to work.

a. *Interactive process*.

The Board asserted it engaged in the following interactive process to reach an accord with Kleinman:

On December 13, 2008, Kleinman submitted her request for reasonable accommodations and her doctor's clarification of her restrictions. On December 15, and again on December 18, Hidalgo extended her an offer of a position conducting settlement conferences from 10:00 a.m. to 3:00 p.m. at the Board's Rancho office, Monday through Thursday, and that she could work at home on Fridays, putting in an eight-hour day doing paperwork. Her time base would be adjusted to reflect shortened hours on Monday through Thursday, with a full eight-hour day on Friday. Kleinman rejected the offer and objected to a part-time salary.

Kleinman then made her case for working at a number of employer sites, discussed the difficulty in commuting to the Los Angeles office, and argued for a full-time position. She was told commute time was not compensable and there was insufficient work at employer sites closer to her home.

Following Kleinman's rejection of the offer, the Board continued to interact with Kleinman about the offer and other alternatives. On December 29, 2008, Hidalgo sent Kleinman the first options letter. This document was six-page memorandum setting forth various options, including filing for disability retirement. Hidalgo also invited her to "present other reasonable accommodations that we have not yet considered" and stated if she were able and willing to "pursue an alternate placement to another classification, a list of current job vacancies will be presented to you." She never requested the job listing. The memorandum also included a blank form captioned "Option Discussion Checklist" which allowed her to check off her preferred options and to designate convenient dates and times to confer with the Board.

Two weeks after said option letter, Kleinman responded to Hidalgo, reiterating her objections to the Board's offer and proposing January 19, 20 or 21 as dates to confer.

On January 20, 2009, Hidalgo called Kleinman, reiterating the Rancho offer. On January 22, Hidalgo emailed Kleinman, again discussing the Rancho offer and the

rationale for it. The email also advised Kleinman to use her leave credits and warned that if she failed to do so, she would not be paid and her health insurance would be suspended in February.

On January 26, 2009, Hidalgo sent Kleinman a second options letter. This four-page memorandum confirmed their January 20 discussion, the Rancho offer, the reasoning behind it, and her rejection of it. The memorandum again set forth Kleinman's various options.

On February 19, 2009, Kleinman's doctor took her off her work status again, but the Board continued to interact with her.

On April 2, 2009, based on representations Kleinman made in a petition filed in her workers' compensation case that she was able to work *full time in any location*, the Board invited her to return to work full time at the Los Angeles office. This offer included Friday as a telecommute day and a commitment that she would not be required to travel outside the Los Angeles office as long as her travel restrictions remained in place.

On April 16, 2009, Kleinman rejected the offer.

On May 4, 2009, Hidalgo sent another letter to Kleinman, again extending an offer to have her work full time at the Los Angeles office, with Fridays as a telecommute day. Hidalgo asked Kleinman to identify the specific reasonable accommodations she believed were necessary for her to return to work.

Kleinman's counsel responded to the May 4 offer, stating Kleinman is "suffering from a series of disabilities which prevent her from working at this time."

On May 20, 2009, Hidalgo responded to Kleinman's counsel, expressing the Board's willingness to continue with the interactive process when Kleinman was cleared to return to work and could provide a list of any restrictions.

On September 16, 2009, Hidalgo sent Kleinman a third options letter. In four pages, he outlined various options available to her, now that her workers compensation temporary disability payments were being terminated. Kleinman's options included:

suggesting reasonable accommodations, a job change to another classification, use of her leave credits, and disability retirement filed on her behalf by the Board.

On September 21, 2009, Kleinman responded, requesting that the Board file for disability retirement on her behalf.

b. *The Board's showing of reasonable accommodations*.

The Board's moving papers on summary judgment also made the following showing with respect to the reasonable of the accommodations:

In December 2007, Ramsey jointed the Board as Chief ALJ. Upon his arrival, he instituted a number of statewide procedural changes. He initiated a practice of setting full-day hearings commencing at 9:00 a.m., and the Board made every attempt to set multi-day matters on consecutive days. This new practice applied to all hearing locations, including remote locations and employer sites. Ramsey also required ALJs to hold hearings on Fridays, and instituted five-day a week hearing calendars. This practice was formally implemented in July 2008.

On December 1, 2008, Kleinman's doctor released her to work, restricting her to driving between the hours of 8:00 a.m. and 5:00 p.m., with driving no more than two hours from home, and telecommuting on Fridays.

The Board maintains two office locations in Southern California, one in downtown Los Angeles and one in Rancho. Kleinman's commute from Tujunga to Rancho was up to two hours each way. Similarly, Kleinman's commute to Los Angeles would be one and a half to two hours, regardless of parking availability.

Based on Kleinman's restrictions, she could not preside over full day evidentiary hearings. Her restrictions, however, would enable her to preside over settlement conferences, which were scheduled at two-hour intervals. Based on the restrictions imposed by Kleinman's doctor, the Board made the following offer to her: she could conduct settlement conferences at the Rancho office, Monday through Thursday, between the hours of 10:00 a.m. and 3:00 p.m., and could telecommute on Fridays, for a part-time position of 24 hours per week, or longer, depending on the length of her lunch breaks. Further, she would not be required to fly or to travel on weekends or holidays.

3. *Trial court's ruling.*

On May 11, 2010, the trial court heard and granted the motion for summary judgment. In granting the motion, the trial court observed, "[Kleinman] couldn't travel . . . any time before 8:00, and she couldn't travel any time after 5:00. And so that shortens the time frame in which opportunities were available. Then she couldn't walk more than two blocks, and there weren't enough parking places, so that limited the geographic area in which she could work. So within the confines of what was available, it appears that the defense has adequately established that they could not provide a functional equivalent to what was needed to accommodate the restrictions."

With respect to Kleinman's assertion that Ramsey discriminated against her, the trial court stated: "[H]e . . . runs the department. He has to make the department function. He's accountable to the public. [¶] So how much do we have to accommodate plaintiff's disabilities and still be accountable to the public and still have a functioning department? . . . [¶] . . . [¶] . . . If [the Board] can show that, in fact, there is not enough work at the work sites to justify a full-time ALJ position, . . . the best accommodation that they could make is to provide her with the part-time position in Rancho Cucamonga where she could work I believe it was 27 hours [per week]."

The trial court noted "there were two separate offers of accommodation at two separate intervals. There was extensive discussion about how she could be accommodated. The declarations are unrefuted. I've got Hidalgo's declaration that says this is what we did to engage in the interactive process. These are the conference calls that we had. These are the offers that we extended. She rejected those offers. [¶] And each declaration . . . supports the decision making that went into those offers: The geographic limitations; the walking restrictions, one right after the other. . . . [T]here's no evidence as to how it could be restructured in such a way as to accommodate these restrictions, given Los [Angeles] County and the geographic limitations and the walking restrictions."

The trial court concluded that based on the separate statements, there were no triable issues of fact, it "appear[ing] that the employer made adequate efforts to attempt to accommodate within the restrictions that were imposed by the doctor . . . ."

Kleinman filed a timely notice of appeal from the judgment.

CONTENTIONS

Kleinman contends summary judgment cannot be justified on her claims for (1) failure to provide a reasonable accommodation, (2) failure to engage in a timely, good faith interactive process, and (3) disability discrimination pursuant to section 12940, subdivision (a).

DISCUSSION

1. *Standard of appellate review.*

Summary judgment "motions are to expedite litigation and eliminate needless trials. [Citation.] They are granted 'if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' [Citations.]" (*PMC, Inc. v. Saban Entertainment, Inc*. (1996) 45 Cal.App.4th 579, 590.) "Summary judgment is a drastic remedy to be used sparingly, and any doubts about the propriety of summary judgment must be resolved in favor of the opposing party. [Citations.]" (*Mateel Environmental Justice Foundation v. Edmund A. Gray Co*. (2003) 115 Cal.App.4th 8, 17; accord, *Kasparian v. AvalonBay Communities, Inc.* (2007) 156 Cal.App.4th 11, 19.)

A defendant meets its burden upon such a motion by showing one or more essential elements of the cause of action cannot be established, or by establishing a complete defense to the cause of action. (Code Civ. Proc, §437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 849.) Once the moving defendant has met its initial burden, the burden shifts to the plaintiff to show a triable issue of one or more material facts exists as to that cause of action or a defense thereto. (*Aguilar*, at p. 849; Code Civ. Proc., §437c, subd. (p)(2).)

We review the trial court's ruling on a motion for summary judgment under the independent review standard. (*Rosse v. DeSoto Cab Co*. (1995) 34 Cal.App.4th 1047, 1050.)

2. *FEHA.*

FEHA "prohibits employment discrimination based on a physical disability. [Citations.]" (*Colmenares v. Braemar Country Club, Inc*. (2003) 29 Cal.4th 1019, 1022.) As relevant here, FEHA prohibits an employer, "because of . . . [a] physical disability . . . [from] discharg[ing] the person from employment . . . or . . . discriminat[ing] against the person . . . in terms, conditions, or privileges of employment." (§ 12940, subd. (a).) What is not prohibited is the discharge of an employee with a physical disability "where the employee, because of his or her physical . . . disability, is unable to perform his or her essential duties even with reasonable accommodations . . . ." (*Id*., subd. (a)(1).)

FEHA also makes it unlawful for an employer "to fail to make reasonable accommodation for the known physical . . . disability of an applicant or employee," except where the employer demonstrates an accommodation would "produce undue hardship to its operation." (§ 12940, subd. (m).) Additionally, under FEHA, it is unlawful for an employer "to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical . . . disability . . . ." (*Id*., subd. (n).)

Each of these unlawful employment practices gives rise to a separate cause of action. (*Gelfo v. Lockheed Martin Corp*. (2006) 140 Cal.App.4th 34, 54 (*Gelfo*).) To establish a prima facie case of physical disability discrimination under FEHA, the employee must demonstrate he or she is disabled and otherwise qualified to do the job and was subjected to an adverse employment action because of such disability. (*King v. United Parcel Service, Inc*. (2007) 152 Cal.App.4th 426, 432, fn. 2; *Faust v. California Portland Cement Co*. (2007) 150 Cal.App.4th 864, 886.) The employee must establish she is a "qualified individual," i.e., an employee who can perform the essential functions of the job with or without reasonable accommodation. (*Green v. State of California*

(2007) 42 Cal.4th 254, 260-261.) If this burden is met, it is then incumbent on the employer to show it possessed a legitimate, nondiscriminatory reason for its employment decision. (*Deschene v. Pinole Point Steel Co*. (1999) 76 Cal.App.4th 33, 44.) When this showing is made, the burden shifts back to the employee to produce substantial evidence that employer's given reason was either "untrue or pretextual" or that the employer acted with discriminatory animus in order to raise an inference of discrimination. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005.)

"The elements of a failure to accommodate claim are similar to the elements of a . . . section 12940, subdivision (a) discrimination claim, but there are important differences. The plaintiff must, in both cases, establish that he or she suffers from a disability covered by FEHA and that he or she is a qualified individual. *For purposes of [a failure to accommodate] claim, the plaintiff proves he or she is a qualified individual by establishing that he or she can perform the essential functions of the position to which reassignment is sought, rather than the essential functions of the existing position*. [Citations.] More significantly, the third element [under a subdivision (a) claim] . . . establishing that an 'adverse employment action' was caused by the employee's disability – is irrelevant to this type of claim. Under the express provisions of the FEHA, the employer's failure to reasonably accommodate a disabled individual is a violation of the statute in and of itself. [Citation.]" (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 256, italics added.) " 'Ordinarily, the reasonableness of an accommodation is an issue for the jury.' [Citation.]" (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 954.)

"While a claim of failure to accommodate [under subdivision (m)] is independent of a cause of action for failure to engage in an interactive dialogue [under subdivision (n)], each necessarily implicates the other." (*Gelfo, supra*, 140 Cal.App.4th at p. 54; see also § 12940, subds. (m) & (n).)

"Section 12940, subdivision (m) provides that it is an unlawful employment practice '[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical . . . disability of an applicant or employee.'

'Two principles underlie a cause of action for failure to provide a reasonable accommodation. First, the employee must request an accommodation. [Citation.] Second, the parties must engage in an interactive process regarding the requested accommodation and, if the process fails, responsibility for the failure rests with the party who failed to participate in good faith. [Citation.]' [Citations.]" (*Avila v. Continental Airlines, Inc*. (2008) 165 Cal.App.4th 1237, 1252.)

"Generally, ' "[t]he employee bears the burden of giving the employer notice of the disability. [Citation.] This notice then triggers the employer's burden to take 'positive steps' to accommodate the employee's limitations. . . . [¶] . . . The employee, of course, retains a duty to cooperate with the employer's efforts by explaining [his or] her disability and qualifications. [Citation.] Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the [employee's] capabilities and available positions." [Citation.]' [Citation.]" (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1222 (*Raine*).)

FEHA "does not obligate an employer to choose the best accommodation or the specific accommodation a disabled employee or applicant seeks. [Citation.] It requires only that the accommodation chosen be 'reasonable.' (§ 12940, subds. (a) & (m).) Although FEHA does not define what constitutes 'reasonable accommodation' in every instance, examples provided in the statute itself and the regulations governing its implementation include job restructuring, part-time or modified work schedules or 'reassignment to a vacant position.' [Citations.]" (*Raine, supra,* 135 Cal.App.4th at pp. 1222-1223.)

If the employee "cannot be accommodated in his or her existing position and the requested accommodation is reassignment, an employer must make affirmative efforts to determine whether a position is available. [Citation.] A reassignment, however, is not required if 'there is no vacant position for which the employee is qualified.' [Citations.]" (*Raine, supra,* 135 Cal.App.4th at p. 1223.) Moreover, "[t]he responsibility to reassign a disabled employee who cannot otherwise be accommodated does 'not require creating a

new job, moving another employee, promoting the disabled employee, or violating another employee's rights . . . .' " (*Spitzer v. Good Guys, Inc*. (2000) 80 Cal.App.4th 1376, 1389; see also *McCullah v. Southern Cal. Gas Co*. (2000) 82 Cal.App.4th 495, 501 [employer not "required to create new positions or 'bump' other employees to accommodate the disabled employee"].)

3. *Trial court properly found the Board reasonably accommodated Kleinman's disability; on this record reasonableness of the accommodation can be determined as a matter of law.*

As indicated, Kleinman's second window of availability commenced on December 1, 2008 and lasted 80 days, until February 19, 2009. During that interval, she was released by her doctor to work with the following restrictions: no driving more than two hours from home on the day of a scheduled hearing; driving was limited to the hours of 8:00 a.m. to 5:00 p.m.; walking no more than two blocks at a time; a 15-minute break after 40 minutes of driving; and telecommuting each Friday.

The part-time position in Rancho handling settlement conferences, an accommodation which the Board proposed, and which Kleinman rejected, perfectly dovetailed with these restrictions.

To reiterate, the Board made the following offer to her: she could conduct settlement conferences at the Rancho office, Monday through Thursday, between the hours of 10:00 a.m. and 3:00 p.m., and she could telecommute on Fridays, for a part-time position of 24 hours per week, or longer (depending on the length of her lunch breaks).

Kleinman rejected this proposal on the grounds she did not want to work merely part time, and she did not wish to be relegated to conducting settlement conferences. Instead, she wished to be assigned to full-time work, conducting evidentiary hearings as well as settlement conferences as she had done in the past.

Kleinman contends that although she could not conduct all-day evidentiary hearings, between the hours of 9:00 a.m. and 5:00 p.m. due to her driving restrictions, a trier of fact "could easily determine that . . . she could have conducted evidentiary hearings and also successfully worked a full-time 40 hours week (e.g., by preparing for

the hearings before she left her home, conducting partial-day evidentiary hearings over consecutive days, and reviewing the cases and writing decisions at home in the evenings)."

However, as the trial court ruled, the Board was entitled to require that evidentiary matters be set for full-day hearings, and that matters be heard on consecutive days, including Fridays. The Board was not required to modify its five-day a week hearing calendar and to create an ALJ position for Kleinman consisting of half-day evidentiary proceedings, Monday through Thursday.

Raine is on point. There, the defendant municipal employer reassigned a police officer to a temporary light-duty position to accommodate his injury while it healed. (*Raine, supra,* 135 Cal.App.4th at p. 1218.) The employee remained in that position for six years until his physician advised the employer the disability was permanent. (*Ibid*.) The employer told the employee it had no available permanent position for a sworn police officer for someone with the employee's qualifications, and offered him a desk position as a civilian police technician. (*Id*. at p. 1219.) The employee declined the offer, took disability retirement, and sued the employer under the FEHA, contending the employer failed to reasonably accommodate his limitations by making his temporary position permanent. (*Id.* at p. 1219.) The *Raine* court, affirming summary judgment in the employer's favor, held the employer had no obligation under the FEHA to make the temporary light-duty position available indefinitely once the employer learned the disability was permanent. (*Id*. at pp. 1217-1218.) The employee was entitled to a reasonable accommodation, which might include reassignment if a vacant position were open; the employer was not required, however, to create a new sworn officer position of front desk officer by making a temporary position permanent. (*Id*. at p. 1227.) Further, the FEHA "does not obligate an employer to choose the best accommodation or the specific accommodation a disabled employee or applicant seeks. [Citation.] It requires only that the accommodation chosen be 'reasonable.' " (*Raine, supra,* 135 Cal.App.4th at p. 1222.)

Also pertinent is *Nadaf-Rahrov v. Neiman Marcus Group, Inc*. (2008) 166 Cal.App.4th 952, at pages 973-974. There, the court, adopting the definition found in the federal Equal Employment Opportunity Commission (EEOC) interpretive guidance on the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.) (ADA), interpreted " 'reasonable accommodation' " in the FEHA to mean a modification or adjustment to the workplace that enables the employee to perform the "*essential functions*" of the position. (Accord, *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1010 (*Scotch*).)

Here, the essential functions of an ALJ hearing evidentiary matters for the Board includes the ability to conduct full-day evidentiary hearings, for consecutive days, including Fridays. The Board is entitled to conduct its business in that manner. Kleinman admittedly is incapable of working such a schedule. Therefore, the Board acted reasonably in proposing an accommodation which perfectly dovetailed with the restrictions imposed by her doctor. Merely because the Board selected an accommodation which was not to Kleinman's liking does not give rise to a cause of action for failure to accommodate.

Kleinman cites *Roby v. McKesson Corp*. (2009) 47 Cal.4th 686, for the proposition that an employer who "refuses to make exceptions in its normal policies to accommodate a disabled worker has violated the FEHA." However, *Roby* does not stand for that proposition. The issues in *Roby* were whether the Court of Appeal erred (1) in concluding that some of plaintiff's noneconomic damages awards overlapped one another; (2) in allocating plaintiff's evidence between her harassment claim and her discrimination claim, and, based on that allocation, in finding insufficient evidence to support the harassment verdict; and (3) in concluding that the punitive damages against the employer exceeded the federal constitutional limit. (*Id*. at p. 693.) The issue of what constitutes a reasonable accommodation for an employee's disability was not discussed in *Roby*. Therefore, Kleinman's reliance on *Roby* is misplaced.

4. *Kleinman's proposed accommodation in Los Angeles*.

Kleinman contends the Board could have accommodated her, inter alia, by assigning her to its downtown Los Angeles office with assigned parking in the vicinity, and that the Board did not attempt to secure parking for her in that location. Kleinman argues her proposed accommodations – such as a full-time assignment at the downtown Los Angeles office with nearby parking – should be evaluated by the trier of fact.

However, Kleinman was incapable of conducting full-day evidentiary hearings at any location. Therefore, even if Kleinman were assigned to downtown Los Angeles rather than Rancho, she was still incapable of handling full-day evidentiary proceedings on consecutive days, including Fridays, which was an essential function of the position being sought by her.[3]

5. *Board's alleged failure to engage in interactive process*.

To prevail "on a claim under section 12940, subdivision (n) for failure to engage in the interactive process, an employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred." (*Scotch, supra*, 173 Cal.App.4th at p. 1018.)

Here, Kleinman has not shown any reasonable accommodation for her disability, other than the one which the Board proposed, i.e., a part-time position handling settlement conferences. Although Kleinman sought to retain her full-time position and salary, she was incapable of handling full-day evidentiary proceedings on consecutive days, including Fridays, which was an essential function of the position she was seeking. Because Kleinman's proposed accommodation was not a reasonable accommodation, no triable issue exists on her cause of action against the Board for its alleged failure to engage in the interactive process.

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[3] We also note the commute into downtown Los Angeles was not appreciably shorter than the commute to Rancho. Kleinman did not dispute the Board's Undisputed Material Fact No. 70, to wit: "Her commute to Los Angeles would be one and-a-half to two hours regardless of parking availability."

6. *Claim of disability discrimination.*

In view of the absence of a triable issue on Kleinman's claims for failure to accommodate and failure to engage in the interactive process, her claim of disability discrimination likewise fails.

DISPOSITION

The judgment is affirmed. The parties shall bear their respective costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.